

COMMONWEALTH OF KENTUCKY
BEFORE THE PUBLIC SERVICE COMMISSION

In the Matter of:

CONSTELLATION NEW-ENERGY-GAS)	
DIVISION, LLC)	
)	
COMPLAINANT)	
)	
V.)	CASE NO. 2005-00184
)	
COLUMBIA GAS OF KENTUCKY, INC.)	
)	
DEFENDANT)	

O R D E R

This matter comes before the Commission on a complaint filed by Constellation New-Energy-Gas Division, LLC ("CNEG") against Columbia Gas of Kentucky, Inc. ("Columbia"). The Commission directed Columbia to satisfy or answer the complaint. Columbia timely responded and moved the Commission to dismiss the complaint alleging that CNEG lacks standing to bring the action. CNEG filed a response in opposition to the motion contending that it has standing to bring the action on its behalf and on behalf of its customers. By this Order we deny Columbia's motion and establish the procedural schedule appended hereto as Appendix A.

BACKGROUND

CNEG states that it is a natural gas marketer that provides natural gas commodity and related services to commercial and industrial customers. Its services include managing and arranging for the supply of natural gas to its customers who are

provided local distribution services via Columbia's Delivery Service Tariff. CNEG states that it arranges for the purchase of each of its customer's natural gas supply requirements on a daily and monthly basis as well as acquiring the necessary interstate pipeline transportation capacity to enable delivery of the commodity to the appropriate city gate on Columbia's system. CNEG states that Columbia takes delivery of the supply at its city gate and distributes the gas supply to its respective plants or facilities.

CNEG states that Columbia posted a Daily Delivery Interruption ("DDI") notice on November 17, 2004 that placed different delivery requirements on its delivery service customers based on the customer's daily measurement status.¹ CNEG states that upon receiving the DDI Notice, it identified which of its Columbia customers had telemetering service and which did not and that, based on this information, it adjusted each customer's supply so that each would be in compliance with the DDI notice.²

CNEG states that it subsequently discovered that some of its non-telemetered customers were determined by Columbia to fall within the class of "daily metered" customers and that, as a result, these customers were penalized in the total sum of

¹ "CKY's Volume Banking and Balancing Service is being restricted for the reasons cited below. As a result, Delivery Service customers without daily measurement are required to deliver confirmed scheduled supply that is **no more than 33%** of the Customer's Maximum Daily Quantity (MDQ). . . . Delivery Service customers with daily measurement are required to deliver confirmed scheduled supply that is **no more than** their actual daily demand."

Formal Complaint, Exhibit 1.

² Response of Constellation New-Energy-Gas Division, LLC to Motion for Dismiss [sic] of Columbia Gas of Kentucky, Inc. at 2.

\$25,192.50 for failing to adhere to the DDI notice.³ CNEG states that the term “daily measurement” is not defined in Columbia's tariff, was not defined in its November 17, 2004 DDI notice, and was not conveyed to CNEG or its customers prior to the imposition of the penalties complained of herein.⁴ It alleges that the penalties were inappropriately assessed by Columbia and that Columbia should refund the penalty charges to the affected customers.

CNEG also alleges that Columbia inappropriately assessed penalties against CNEG's customers under Columbia's Interruptable Service Rate Schedule as that rate schedule does not authorize the imposition of a penalty for violations of a DDI notice. CNEG requests that the Commission order Columbia to refund the penalties assessed to CNEG customers during the November 17, 2004 DDI period and to provide CNEG, on a continuing basis, customer-related information that identifies whether the Columbia customer is a daily metered account.

Columbia states that CNEG lacks standing to prosecute its complaint. Citing the case of *Healthamerica Corp. v. Humana Health Plan*, 697 S.W. 2d 946 (Ky. 1985), Columbia argues that, in order to have standing in a lawsuit or an adjudicative proceeding, a party must have a judicially recognizable interest in the subject matter of the suit and that his interest must be present or substantial as distinguished from a mere expectancy. It further argues that CNEG has not demonstrated that it has any present interests or legal rights at stake and that, pursuant to *Warth v. Seldin*, 422 U.S. 490, 95 S.Ct. 2197, 45 L.Ed. 2d 343 (1975), its claim for relief cannot rest upon the

³ *Id.* at 3.

⁴ *Id.* at 4.

legal rights of a third party. It states that the penalties issued were billed to end-use customers, not CNEG, and that the claims or interests of the end-use customers will not confer standing upon CNEG. It further states that even if CNEG could support its position that it has the authority to act on behalf of the end-use customers, the end-use customers are indispensable to the proceeding.

Columbia contends that the Commission has likewise held that every action shall be prosecuted in the name of the real party in interest and cites in support of its contention the Commission's decision in *McGinnis v. GTE South Incorporated*, PSC Case No. 1999-00495 (February 14, 2000), and its decision in *Adjustment of Gas Rates of The Union Light, Heat and Power Company*, PSC Case No. 2001-00092.

CNEG argues that it has standing to bring this action on its own behalf and that of its customers. It states that it has an Agency Agreement with each of its customers that designates CNEG as the exclusive authorized representative to act on behalf of the customers in matters involving the management of their natural gas supply, transportation needs, and all related services. CNEG contends that Columbia is aware of CNEG's agency relationship as it provided the November 17, 2004 DDI notice directly to CNEG. CNEG further states that, pursuant to its Agency Agreements with its customers, it is responsible for interpreting and applying Columbia's tariffs and DDI notices and that it has been directly affected by Columbia's misapplication of its tariffs and its DDI notices. It contends, therefore, that it has standing in its own right to seek a ruling from this Commission clarifying the terms of Columbia's tariff.

DISCUSSION

CNEG brought its complaint pursuant to KRS 278.260 which provides:

The commission shall have original jurisdiction over complaints as to rates or service of any utility, and upon a complaint in writing made against any utility by any person that any rate in which the complainant is directly interested is unreasonable or unjustly discriminatory, or that any regulation, measurement, practice or act affecting or relating to the service of the utility or any service in connection therewith is unreasonable, unsafe, insufficient or unjustly discriminatory, or that any service is inadequate or cannot be obtained, the commission shall proceed, with or without notice, to make such investigation as it deems necessary or convenient. The commission may also make such an investigation on its own motion. No order affecting the rates or service complained of shall be entered by the commission without a formal public hearing.

KRS 278.260(1) (emphasis added). While mandating that the Commission hear complaints regarding a utility's rates by persons "directly interested" in those rates, the statute does not define "directly interested."

The Commission has previously addressed and rejected Defendant's contention that only a utility customer can be a "directly interested" person. See *Power Development Systems, Inc. v. Kentucky Utilities Co.*, Case No. 9456 (Ky. P.S.C. Feb. 27, 1986) at 2 (KRS 278.260(1) does not require that "complaints be made only by customers"). See also *Hogan v. Spanish Cove Sanitation*, Case No. 94-346 (Ky. P.S.C. Feb. 10, 1994), at 2 (holding that KRS 278.260(1) does not require a complainant to "have a direct financial interest in the subject matter of the complaint").

The Commission has reviewed its decisions regarding standing in the cases Columbia cited and finds those proceedings distinguishable from the present case. The Commission reviewed and denied Stand Energy Corporation's request to intervene on

behalf of an industrial customer in The Union Light Heat and Power Company's rate adjustment proceeding based on the regulatory requirements for full intervention set forth in 807 KAR 5:001, Section 3(8). The "standing" requirements for intervention are not exactly the same as the "standing" requirements for filing a complaint. While *McGinnis, supra*, was a complaint case and the standing issue was considered under the same criteria as the case at bar, the Commission found that the losses complained of were those solely of the corporation, not its shareholder. In the present case, we find that CNEG, as agent for its customers, is responsible for interpreting and ensuring that its customers comply with the provisions of Columbia's Daily Delivery Service tariff and any DDI notice it may issue. We also find that CNEG has presented sufficient interest to permit its complaint under KRS 278.260 on its own behalf and on behalf of its principals. We find, therefore, that Columbia's motion should be denied and that the procedural schedule appended hereto as Appendix A should be followed for the processing of this proceeding.

IT IS THEREFORE ORDERED that:

1. Columbia's motion to dismiss is denied.
2. The procedural schedule set forth in Appendix A shall be followed in this proceeding.
3. All interrogatories and requests for production of documents shall be appropriately indexed. Responses shall include the name of the individual responsible for responding to the questions related to the information provided.
4. Service of any document or pleading shall be made in accordance with 807 KAR 5:001, Section 3(7), and Kentucky Civil Rule 5.02.

5. All documents filed with the Commission shall also be served upon all parties of record at or before the time of filing.

6. All parties shall respond to any interrogatories and requests for production of documents that Commission Staff submits in accordance with the procedural schedule set forth in Appendix A.

7. Motions for extensions of time with respect to the schedule herein shall be made in writing and will be granted only upon a showing of good cause.

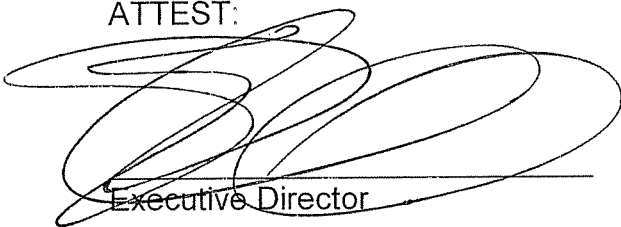
8. At any public hearing in this matter, neither opening statements nor summarization of direct testimony shall be permitted.

9. Nothing contained herein shall prevent the Commission from entering further Orders in this matter.

Done at Frankfort, Kentucky, this 12th day of July, 2006.

By the Commission

ATTEST:



Executive Director

APPENDIX A

APPENDIX TO AN ORDER OF THE KENTUCKY PUBLIC SERVICE
COMMISSION IN CASE NO. 2005-00184 DATED July 12, 2006.

Informal conference shall be held at 1:00 p.m.,
Eastern Daylight Time, in Conference Room 1
of the Commission's offices at 211 Sower Boulevard,
Frankfort, Kentucky 7/28/06

Each party shall file with the Commission direct
testimony in verified prepared form no later than 8/10/06

Each party may serve upon the other party an initial
request for production of documents and written
interrogatories no later than 8/24/06

Each party shall file responses to the initial requests
for information no later than 9/07/06

Rebuttal testimony, if any, shall be filed in verified
prepared form no later than 9/21/06